Matthias Chang v The District Grand Lodge of the Eastern Archipelago (sued by its District Grand Master Joseph William Yee Eu) and Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–Q2–25 OF 1998
PS GILL, RAHMAH HUSSAIN FCJJ AND MOKHTAR SIDIN JCA
23 DECEMBER 2004

Administrative Law — Remedies — Declaration — Applicant a member of a registered society — Notice indicating intention to relinquish membership given to court — Whether renders further hearing of matter an academic exercise

The appellant and the second-sixth respondents were members of a Fraternity known as the Freemasons, which conducted its activities through the first respondent. The appellant had sought for certain declarations in the High Court against the respondents on the ground that they had pursued a course of action against him which was contrary to the rules of natural justice. The High Court dismissed his application and hence this appeal. Prior to the hearing of this appeal, the appellant filed a notice a motion *vide* encl 9 and in the affidavit in support had stated, *inter alia*, at para 7, that he did not intend to retain his membership in the said Fraternity. The issue before this court was whether determining this appeal would be an academic exercise in light of that statement made in para 7.

Held, dismissing the appeal:

With reference to the appellant's sworn statement in the affidavit in support of encl 9, it was concluded that the appellant had no desire to retain his membership in the said Freemasons Lodge and had decided to pursue this appeal as a form of vindication for himself against the acts of the Committee of Inquiry of the Freemasons Lodge. Accordingly, he could no longer be the recipient of any benefit of any of the declarations sought. Although the grant of declaratory continues to remain a useful remedy granted by court in appropriate cases, it remains a discretionary remedy (see paras 13, 17 and 19).

[**Bahasa Malaysia summary**

Perayu dan responden kedua sehingga ke-enam adalah ahli-ahli kepada suatu *Fraternity* yang dikenali sebagai Freemasons, yang mengendalikan aktiviti-aktivitinya melalui responden pertama. Perayu telah memohon untuk beberapa deklarasi di Mahkamah Tinggi terhadap pihak responden atas alasan mereka telah melaksanakan suatu siri tindakan yang bertentangan dengan rukun keadilan asasi. Mahkamah Tinggi telah menolak permohonannya, dan maka rayuan ini. Sebelum rayuan ini dibicarakan, perayu telah memfailkan suatu notis usul melalui lampiran 9 dan di dalam afidavit sokongannya telah menyatakan, antara

lain, pada perenggan 7, bahawa dia tidak ada niat untuk mengekalkan keahliannya di dalam *Fraternity* tersebut. Isu di hadapan mahkamah ini adalah sama ada membicarakan rayuan ini akan menjadi suatu latihan akademik melihat kepada pernyataan berkenaan yang dibuat di perenggan 7.

Diputuskan, menolak rayuan tersebut:

Merujuk kepada pernyataan bersumpah perayu di dalam afidavit sokongan kepada lampiran 9, telah diputuskan bahawa perayu tidak berhasrat untuk mengekalkan keahliannya di dalam Freemasons Lodge dan telah menetapkan untuk memajukan rayuan ini sebagai suatu cara untuk menjustifikasikan dirinya terhadap tindakan jawatankuasa siasatan Freemasons Lodge. Maka dengan itu, dia tidak boleh lagi menjadi penerima kepada apa-apa manfaat di bawah perintah deklarasi yang dipohon olehnya. Walaupun pemberian relif deklarasi terus wujud sebagai suatu remedi yang berguna yang diberikan oleh mahkamah di dalam kes-kes yang sesuai, ia adalah suatu remedi yang mengikut budi bicara (lihat perenggan 13, 17 dan 19).]

Notes

For cases on declaration, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 420–486.

For cases on application for declaration, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1947–1963.

For declarations, see 9 *Halsbury's Laws of Malaysia* (2001) paras [160.166]–[160.168].

Cases referred to

Ainsbury v Mlllington [1987] 1 All ER 929 (refd)

Datuk Syed Kecik bin Syed Mohamed & Anor v Board of Trustees of the Sabah Foundation & Ors and Another Application [1997] 1 MLJ 257 (refd)

Loknath Padhan v Birendra Kumar Sahu AIR 1974 505 (refd)

Matthias Chang v The District Grand Lodge of the Eastern Archipelago & Ors [1998] MLJU 273 (refd)

Matthias Chang Wen Chieh v Joseph William Yee Eu & Anor [1997] 5 MLJ 727 (refd)

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh [1992] 1 MLJ 147 (refd)

Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors [1988] 3 MLJ 82 (refd)

Raphael Pura v Insas Bhd v Anor [2003] 1 MLJ 513 (refd)

Sun Life Assurance Company of Canada v Jervis [1994] 1 All ER 469 (refd)

Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)

Appeal from: Originating Summons No R2–24–26 of 1997 (High Court, Kuala Lumpur)

Dato' Cecil Abraham (Lorraine Cheah with him) (Shearn Delamore & Co) for the first–third respondents
DP Naban (BH Yap with him) (Lee Hishamuddin) for the 4th–6th respondents
Zainur Zakaria (Neoh Poh Cheng with him) (Zainur Zakaria & Co) for the appellant

PS Gill FCJ (delivering judgment of court):

[1] The appellant, an advocate and solicitor, and the defendant are members of a Fraternity, commonly known as the Freemasons under the jurisdiction of the organization known as the 'United Grand Lodge of England', hereinafter referred to as ('the Grand Lodge'). The membership in areas outside the Untied Kingdom is governed by its subsidiary organizations commonly known as 'District Grand Lodges' which are duly registered societies under the laws of the countries in which their members reside.

[2] In Malaysia and Singapore, the Freemasons come under the jurisdiction of the 'District Grand Lodge of the Eastern Archipelago' of which the second respondent is the District Grand Master.

[3] Within the District Grand Lodge there are several Private Lodges which come under its jurisdiction. The parties to this appeal are members of the Lodge and are commonly known as the Freemasons.

[4] All Freemasons who are members of the respective District Grand Lodges owe allegiance to the Grand Lodge and are governed by the rules and regulations contained in the Book of Constitution of the said Grand Lodge. Further they are also governed by the 'Antient Charges' which are akin to customs and conventions of the Fraternity as well as the several obligations they are obliged to take, without which they cannot be admitted as members.

[5] All the provisions constitute a contractual relationship, which bind the members inter se.

[6] Like any other society, the infraction of any provision entitles members to impose disciplinary measures on defaulted members such as censure, to suspend, or to expel.

[7] The crux of this appeal, is basically about a complaint of alleged misconduct of the appellant, as a member of the Freemason Lodge. Consequently the second respondent took up this complaint with the third respondent who appointed a Committee of Enquiry comprising the fourth, fifth, sixth and seventh respondents to inquire into the said complaint.

[8] It was the constitutional set up of the Committee of Inquiry and the manner in which the inquiry was conducted that formed the subject matter of civil suit Saman Pemula No R2–24–26 of 1997 (hereinafter referred to as 'the first suit'). After conclusion of the hearing of that suit, the trial judge had this to say. I would reproduce the salient aspects of his judgment for the sake of clarity.

As against Defendant No 1, 2 and 3 I agree with the submission of their Counsel that the Plaintiff has failed to disclose a cause of action against them. The Plaintiff's claim is that the Committee of Inquiry constituted under the Rules which govern the members of the Fraternity had been biased against the Plaintiff and had acted contrary to the rules of natural justice. On the basis of such grounds the Plaintiff sought to apply for a declaration that the Committee of Inquiry's actions were null and void. In my view on these grounds alone no cause of action can be founded against Defendant No 1, 2 and 3.

As to the issue whether the Committee of Inquiry had acted biasedly against the Plaintiff I am unable to find any reason to conclude that the Committee of Inquiry had acted unfairly against the Plaintiff. In fact I do find that the Committee of Inquiry had been very accommodating towards the Plaintiff. On the other hand it was the Plaintiff who was trying to be very uncooperative and difficult acting with preconceived ideas that the Committee were against him from the very beginning. I also find that there is no evidence to say that the Committee of Inquiry had acted contrary to the rules of natural justice. There was no basis for such allegation.

I have read the decision of YA Dato' RK Nathan in Guaman Sivil No S2–23–32–96 (Also reported in MLJ Supp Series [1997] 5 MLJ 727). I completely agree with the views expressed by YA Dato' RK Nathan that it is mandatory for the Plaintiff to exhaust his available remedies within the Fraternity before going to the Court. As a member of the Fraternity he is fully bound by the said Rules which require him to appeal to a higher body within the Society if he is dissatisfied with the decision or action of the Committee of Inquiry. In a Society a person after becoming a member agrees to be bound by the Rules governing the Society. So the Rules have to be adhered strictly by the member. It is different in the case of a statutory provision. Members of the public cannot be said to have given their agreement to exhaust their rights of appeal under the statute. As such they are at liberty to go straight to Court if they so wish, without the need to first exhaust their rights under the statute.

[9] There was an ancillary suit filed vide GS No S2–23–32 of 1996, by the appellant against the second respondent and another, wherein allegations were made by the appellant that the second respondent and another had conspired to injure the integrity, profession, and occupation of the appellant in a systematic campaign of falsehood, misrepresentation, in abuse of their respective offices of District General Lodge of the Eastern Archipelago and District of Hong Kong and Far East. A stay order was granted against the suit on the basis that the appellant had not exhausted the domestic remedies within the society before filing the suit. So much for the historical background, and now to the matter at hand.

[10] Before the commencement of the appeal the respondent had filed a notice of motion *vide* encl (9) and it contained the following prayers:

(a) Kebenaran diberikan kepada perayu untuk mengemukakan keterangan lanjut menurut k 7 Kaedah-kaedah Mahkamah Rayuan 1994;

(b) Perayu dibenarkan memfailkan rekod rayuan tambahan untuk eks 'MC1' dan 'MC2' yang dilampirkan kepada afidavit sokongan perayu atau sebagai

alternatif eks 'MC1' dan 'MC2' tersebut diterima masuk pada perbicaraan rayuan perayu;

(c) Kos permohonan ini adalah kos dalam kausa;

(d) Lain-lain relif yang mahkamah yang mulia ini anggap wajar.

[11] The prayers were accordingly granted.

[12] From the reading of the affidavit in support of this notice of motion, we gather that the stay order that was granted by the trial judge in Civil Suit No S2–23–32–1996 was subsequently set aside by the Court of Appeal. But what was more pertinent in the present affidavit in support of encl 9 was this particular sworn statement that became the focus of our attention. It was para 7 of the said affidavit. For ease of reference it reads as follows:

> Saya sesungguhnya menyatakan bahawa surat ini adalah satu ancaman atas nyawa saya kerana membawa tindakan Guaman Sivil di atas dan rayuan ini dan kerana mendedahkan aktiviti-aktiviti persatuan yang subversif. Surat ini juga cuba menghauskan kesucian prosiding di Mahkamah Rayuan ini dan di Mahkamah Tinggi. *Saya sesungguhnya menyatakan bahawa saya tidak ingin memohon rahim atau menjadi ahli kepada persatuan yang subversif ini tetapi ini tidak bermakna saya tidak layak menerima penghakiman atas kesalahan yang dilakukan terhadap saya apabila saya masih seorang ahli.* (Emphasis is ours).

[13] By this sworn statement, it is our considered view that the appellant has no desire to retain his membership in the said Freemasons Lodge and has decided to pursue this course of action as a form of vindication for himself against the acts of the Committee of Inquiry of the Freemasons Lodge.

[14] Quite naturally, the contents of para 7, encl 9 became the object of strenuous submission by counsel for respondent who submitted that the appellant had clearly expressed his decision not to remain as a member of the Freemasons Lodge. Hence, to prosecute this appeal further was not for the purpose of retaining his membership in the Freemasons Lodge, but instead for a collateral cause, ie vindication for the alleged wrong doings perpetrated by the Committee of Inquiry of the Freemasons Lodge.

[15] The counsel for respondent further submitted that even if the court undertook to hear the appeal, we would not be deciding on an existing *lis* between the appellant and respondent parties before us, but would merely be expressing a view eventually, on a legal conundrum, which the appellant hopes to get decided in his favour, without in any way affecting the position between parties.

[16] In our judgment, we agree that by the time the appeal came to be heard, the appellant had expressed a desire that he did not wish to be associated with the said Freemasons Society. However, this change of heart does not deprive the appellant of a cause of action or a right to proceed with the appeal. The case of

Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 is authority for the proposition, that it is not necessary for an appellant, who seeks relief by way of a declaratory judgment to show that he has a cause of action. What he must show is that he is someone with such an interest in the subject matter of the action so as to justify seeking relief. On the facts disclosed in this case we are aware that the appellant as a person, at the material time of the hearing of the originating summons, had an interest in seeking the relief that he had asked for.

[17] But, it does not follow that, just because the appellant has an interest in the cause of action, he will be entitled to the declaration he seeks, because even though the grant of declaratory relief has, is, and will continue to remain a useful remedy granted by court in appropriate cases, yet it remains a discretionary remedy. To this end, it would be appropriate to repeat what was said by Hashim Yeop A Sani SCJ about the discretion of the court in the case of *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 at p 84:

> It is also an established principle consistently followed by our courts that the issuing of a declaration is discretionary. The power to issue a declaration should be exercised with circumspection with a proper sense of responsibility and ought not to be exercised unless the circumstances justify it. See also the speech of Viscount Radcliffe in the Privy Council in *Ibeneweka v Egbuna* [1964] 1 WLR 219 and *Dato Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus*.

[18] The same judge delivered the decision of the Supreme Court in the case of *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147 where he said:

> As regards the first preliminary objection it is our view that the matter had indeed, by the time the originating summons came before the learned judge, become academic. There was no living issue before the learned judge. There was no longer any lawful recipient of any benefit of any declaration sought in the originating summons. Cases cited by the learned judge (*Sun Life Assurance Company of Canada v Jervis, Loknath Pudhan v Birendra Kumar* and *Mohamad Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors*) constitute ample authorities for the court not to act in vain.

[19] To reiterate, by the time the appeal came to be heard before us, the appellant had expressed a desire not to be associated with the respondent's Society. Thus, he could no longer be the recipient of any benefit of any of the declarations sought and this becomes evident when one looks at the declarations sought. For convenience the declaration sought reads as follows:

(1) that the Committee of Enquiry that sat on 1 March 1997 to enquire into the complaint of the second defendant against the plaintiff be dissolved;

(2) that the third to the sixth defendants be restrained from convening any sitting of the aforesaid Committee of Enquiry or conducting any proceedings or making any decision pursuant thereto;

(3) that the first, second and third defendants herein be restrained from appointing any Committee of Enquiry to enquire into or conduct any proceedings in respect of the complaint by the second defendant against the plaintiff until the final disposal of the plaintiff's appeal against the order of stay obtained in the Civil Suit No S2–23–32–1996 filed by the plaintiff against the second defendant and another.

[20] Though we did proceed to hear other aspects of submissions from respective counsels, we must admit what dominated our thoughts was whether there was an existing *lis* between the appellant and respondents. Any determination we felt of this appeal on any other grounds would be an academic exercise because of the complete indifference in the appellant's stand *vide* para 7 of affidavit in encl 9.

[21] No doubt the appellant may have a desire to get a favourable decision from us, because he fears that other cases of a similar circumstance may arise with the Society whereby others who are affected may then rely on this decision as a guide. Noble as the intention is, a more convenient course is to patiently await a further claim and bring that claim if necessary before the Court of Appeal or Federal Court with parties on record, who are interested in prosecuting or resisting the appeal.

[22] Hitherto, para 7 of encl 9 is the death knell for the appellants, as far as we are concerned. We choose not to exercise our discretion in allowing the declarations sought.

[23] We have in the course of writing this judgment on the issue of *lis* between the parties, referred to a number of authorities both locally and foreign on this point — *Sun Life Assurance Company of Canada v Jervis* [1994] 1 All ER 469, *Ainsbury v Mlllington* [1987] 1 All ER 929, *Raphael Pura v Insas Bhd & Ors* [2003] 1 CLJ 61, and *Loknath Padhan v Birendra Kumar Sahu* AIR 1974 505.

[24] In conclusion, we wish to merely quote the decision of Edgar Joseph Jr FCJ (as he then was) in *Datuk Syed Kecik bin Syed Mohamed & Anor v Board of Trustees of the Sabah Foundation & Ors and Another Application* [1997] 1 MLJ 257 wherein his Lordship stated:

> Having said that, this Court does not sit to decide abstract on academic questions of law regarding which the parties are not in dispute. As Lord Bridge stated in *Ainsbury v Millington* [1987] 1 All ER 929:
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> > When the appeal was called on for hearing before the Appellate Committee your Lordships required to be satisfied that the appeal could properly be entertained having regard to the termination of the parties' tenancy of 24 Marlowe Close to which the respondent's case had directed attention. The principle was clearly stated by Viscount Simon LC in *Sun Life Assurance Company of Canada v Jervis* (1944) 1 All ER 469 at 470–471; (1944) AC 111 at 113–114, where he said:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties … . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

> It is always been a fundamental feature of our judicial system that court decides dispute, between the parties before them, they do not pronounce judgment on an abstract question of law when there is no dispute to be resolved.

[25] This dicta neatly encapsulates the position of the courts in deciding on issues which do not have an impact on the position of the parties.

[26] On these grounds, the appeal is dismissed with costs.

Appeal dismissed.

Reported by M Maheswaran